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SPECIAL EDUCATION
SERVICES

Case Number: 2012-0035

[REDACTED] vs. [REDACTED]

Hearing Officer: Stacey Stutzman

Illinois State Board of Education
Special Education Services
100 North First Street
Springfield, Illinois 62777

Impartial Due Process Hearing Decision Cover Page

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District Name [REDACTED] Phone: [REDACTED]
Superintendent [REDACTED]
Address [REDACTED]
Represented by [REDACTED]

Parent Name [REDACTED] Phone: [REDACTED]
Address [REDACTED]
Represented by [REDACTED]

Date and Timelines

Date of Written Request: 08/04/2011

Date of Hearing: 10/25/2011 to 11/08/2011

Date of Pre-hearing Conf: 09/13/2011

Date of Decision: 11/18/2011

Summary of Decision

Student was placed at [REDACTED], a private therapeutic day school, at District expense on July 1, 2011 in accordance with a directive from the Illinois State Board of Education during the pendency of a section 1983 lawsuit filed by Parent to enforce a favorable due process hearing decision and order entered on June 28, 2010 by another hearing officer regarding the alleged deprivation of FAPE during the 2008-09 and 2009-10 school years. When advised by District that it would not fund the private placement beyond the end of the summer school session, however, Parent submitted a new request for due process hearing alleging that District arbitrarily violated an ISBE directive. Parent obtained an Order of Stay Put from the current hearing officer keeping Student at [REDACTED] during the pendency of this proceeding. Also included in the current hearing request were issues relating to alleged deprivations of FAPE during the 2010-2011 school year, including reading remediation, adaptive P.E., remediation of organizational deficits, provision of a complete curriculum, assistive technology services, medication monitoring and administration, provision of progress reports and school records, and transportation for afterschool tutoring, most of which had been raised in and addressed by the federal court in the 1983 compliance case. As relief in the current matter, Parent asked that [REDACTED] School be declared Student's LRE and that Student be allowed to remain at [REDACTED] rather than be returned to the prior public school placement as designated by his most recent IEP, which was developed as the result of the federal court's preliminary injunction in the 1983 case. The preponderance of the evidence presented by the parties at hearing supported District's position that the IEP developed for Student in Spring of 2011 pursuant to the federal court's order provides FAPE and that it was being implemented in the public school and can continue to be implemented in the public school, which is therefore the LRE in which Student can receive a satisfactory education, and that he therefore does not require a therapeutic day school. The doctrine of res judicata, argued by District counsel in his closing argument, was applicable to bar relief on the issues of reading remediation, organizational deficits, monthly progress reports, assistive technology services, and provision of school records. There was insufficient evidence to support Parent's contentions of FAPE deprivation on the issues of curriculum, adaptive physical education, monitoring and administration of medication, and denial of transportation to and from afterschool tutoring.

HELD: for District

ORDERED: That Student shall be returned to his placement in the public school for implementation of his IEP dated May 11, 2011 at the beginning of the Spring term in January 2012.

ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

██████████

v.

██

)
) ISBE CASE NO. 2012-0035
)
) Stacey Stutzman
) Impartial Due Process
) Hearing Officer

DECISION AND ORDER

This matter is before the undersigned impartial hearing officer for a due process hearing concerning Parent's request for orders that District pay for Student's placement in a therapeutic day school, provide transportation for after-school tutoring at ██████ School, include adaptive physical education in Student's IEP, address Student's organizational needs in his IEP, reimburse Parent for transportation costs incurred in May and June, 2011, provide compensatory services, and convene an IEP meeting. The hearing officer has jurisdiction to hear and decide this matter under *105 ILCS 5/14-8.02a(g)(2010)* and *34 CFR 300.512(2006)*. The undersigned Hearing Officer has advised the parties that there are and have been no conflicts which have prevented her from conducting a fair and impartial hearing and rendering a fair and impartial decision in this cause.

Procedural History

Parent's attorney submitted a *REQUEST FOR DUE PROCESS HEARING* on Parent's behalf to District's Superintendent on August 4, 2011, to which District's counsel responded in writing on August 16, 2011. Parent's counsel also submitted a *Motion for Stay Put Order During Pendency of Proceeding* dated August 4, 2011, to which District's counsel responded in writing on August 15, 2011. A *Memorandum and Interim Order* on that motion was entered on August 15, 2011 designating Student's stay put placement as ██████ School pursuant to an agreement between Parent and the Illinois State Board of education.

The parties participated in state sponsored mediation in lieu of a resolution session on September 1, 2011. The Pre-Hearing Conference date established by the Illinois State Board of Education Special Education Database System was September 6, 2011. However, it was rescheduled for September 13, 2011 upon the joint request of the parties and held on that date as scheduled. The *Pre-Hearing Conference Report* dated September 13, 2011 is incorporated into this Decision as *Hearing Officer Exhibit A*.

Parent's counsel submitted a *Motion for an Interim Order* on October 10, 2011 requesting District to provide him with copies of certain outstanding requested documents, which District's counsel agreed to in a status conference held by telephone on October 13, 2011, and which he did, as confirmed in an email dated October 14 2011. During the aforesaid status conference, at Parent's counsel's request, the undersigned also agreed to allow the testimony of certain witnesses by telephone during the hearing. (See *Report of Status Conference*, dated 10/17/11)

At the time of the Pre-Hearing Conference, the undersigned offered to convene the due process hearing on September 27, 2011, but Parent's attorney requested postponement of the hearing to October 25 to allow time to complete an adaptive physical education assessment of Student, and District counsel agreed to the postponement. Hearing was therefore scheduled for October 25 through October 28, 2011, and it was held as scheduled on those dates, but it was not completed due to the illness of witness ██████, which prevented her from testifying as scheduled. Parent's counsel was able to reschedule her testimony for November 8, 2011, at which time she was sufficiently recovered to give her testimony by telephone. Counsel advised the undersigned

that they had no more witnesses they wished to call, and they therefore presented oral closing arguments on that date, at which time the hearing was concluded.

Due to the postponements of the Pre-Hearing Conference and hearing at the requests of the parties as noted above, this Decision is not being issued within 45 days of the initiation of the statutory 45 day timeline. It is being issued within 10 days of completion of the hearing.

The hearing was convened at Public School P on October 25, Public School H on October 26 and 27, ██████████ on October 28, and District offices on November 8, 2011. In attendance at the hearing of this matter were Parent, ██████████ attorney for Parent, and ██████████ attorney for District. Also in attendance for the hearing on October 28, 2011 was Student's sister. The hearing was reported by ██████████ CSR on October 25 and 26, 2011, by ██████████ CSR on October 27, and by ██████████, CSR on October 28, 2011, all of ██████████. It was reported by ██████████, CSR of ██████████ on November 8, 2011.

25 witnesses were called to testify over 5 days of hearing. The following witnesses were called to testify on behalf of both parties: **Parent;** Student; ██████████, District Case Manager at School P; ██████████, District Speech/Language Pathologist, formerly at School P; ██████████, District Citywide Teacher; ██████████, private neuropsychological evaluator; ██████████, Student's physician; ██████████, private academic assessor; ██████████, District Case Manager at School H.; ██████████, District Special Education teacher at School H.; ██████████, District Interim Principal at School H.; ██████████, former District School Nurse at School H.; ██████████, Student's physician; ██████████, private speech/language and A.T. evaluator; and ██████████, Assistant Superintendent, Illinois State Board of Education.

Additional witnesses testifying on behalf of Parent were ██████████ private tutor; and the following Cove School personnel: ██████████ Nurse; ██████████ Special Education Teacher; ██████████ Social Worker; ██████████ Assistive Technology Coordinator; ██████████, Director of Occupational Therapy; and ██████████ Executive Director.

Additional witnesses testifying on behalf of District were ██████████, District Speech/Language Pathologist at School H; ██████████ District Occupational Therapist at School H; and ██████████ District Social Worker at School H.

District counsel submitted copies of 573 pages of documents in his disclosure packet at the disclosure deadline in this matter. Parent's counsel submitted 530 pages of documents in his disclosure packet at the disclosure deadline. He was also permitted, by stipulation with District counsel, to include 2 additional pages, numbered PD 531 and PD 532, into his packet, which were identified as emails that were produced by witness ██████████ subsequent to her testimony, which 2 pages were also admitted into evidence by stipulation of the parties on November 8, 2011.¹ Parent's counsel was advised that he could recall witnesses or call additional witnesses if he desired to do so on the basis of any school records that were requested and not produced prior to hearing. He declined to recall or call any additional witnesses in response to that offer. During closing arguments, he made his first reference to documentation of cab fares not reimbursed by District. However, District's objection to admission of those documents at the time of the closing arguments was sustained, since there was no witness testimony as to those expenses or stipulation to the documentation requested or entered into during the hearing.

At the time of closing arguments in this matter, in addition to oral arguments, Parent's counsel submitted a written memorandum of his argument and copies of 2 Illinois hearing officer decisions and federal court decisions in *Knable v. Bexley*, 238 F.3d 755(6th Cir. 2001) and *Kevin T. v. Elmhurst*, 36 IDELR 153, 102 LRP 9030 (N.D. IL 2002). District's counsel also submitted a written memorandum of his argument and copies of federal court decisions in *Highway J Citizens Group v. U.S.D.O.T.*, 456 F.3d 734 (7th Cir. 2006), *Jaccari J. v. Board of Education*, 690 F.Supp.2d 687(N.D. Ill. 2010), and *James and Lee Anne D. v. Board of Education*, 642 F.Supp.2d 804(N.D. Ill. 2009).

¹ As counsel were advised at the time of the Pre-Hearing Conference, as noted at page 4 of the *Pre-Hearing Conference Report*, mere production of a document in the disclosure packet does not deem it admitted into evidence for purposes of consideration in the Decision of this matter. The documents that were referenced at hearing and which deemed admitted for purposes of review in the Decision are listed in the Appendix included with this Decision and Order. Parent's documents are referenced herein by the page number(s) preceded by a "P" and District document numbers are preceded by a "D".

Issues

Parent requests resolution of the following issues:

Whether District has deprived Student of a free appropriate public education as follows:

1. Arbitrarily violated an ISBE directive that the student be placed at [REDACTED]
2. Failure to implement an effective reading remediation program during the 2010-2011 school year;
3. Failure to offer a complete curriculum in both academic areas and in "specials" which include physical education, art, library and computer classes during the 2010-2011 school year;
4. Failure to offer adaptive physical education, despite significant medical impairments of the student during the 2010-2011 school year;
5. Failure to remediate organizational deficits caused by ADHD symptoms during the 2010-2011 school year;
6. Failure to provide monthly progress reports as required by the student's IEP, developed between March and May 2011 and dated May 11, 2011, during the 2010-2011 school year;
7. Failure to provide assistive technology services in conformance with the student's May 11, 2011 IEP, and failure to provide training and support to the student, teachers and parent, so that use of assistive technology resources was compromised during the 2010-2011 school year;
8. Failure to monitor and report on administrations of medications during the 2010-2011 school year;
9. Failure to provide all school records to the parent.
10. Failure to provide transportation to and from after school tutoring in May and June of 2011 as a related service in accordance with Student's IEP of May 11, 2011?

Findings of Fact

The material facts relevant to the issues in this matter are as follows: Student is an 11 year old male who completed the 5th grade in a District elementary school, hereinafter referenced as *School H*, in June 2011 and who began attendance in the summer session at [REDACTED], a private therapeutic day school, on July 1, 2011, pursuant to a directive issued by the Illinois State Board of Education on June 17, 2011. (Parent, S.S., E.H.; P1, 528) He is eligible for special education and related services in the categories of Learning Disability and Other Health Impairment. (P1)

Student's current medical diagnoses include asthma, food and environmental allergies, attention deficit hyperactivity disorder, and bi-polar disorder. In the past, he has also been diagnosed with a swallowing disorder, which, for a time, necessitated the addition of a thickening agent to liquids he consumed to avoid choking, but which has not been a problem at school and was discontinued. [REDACTED] He keeps his inhaler and an EpiPen with him in a small bag while in school. Various medications are and have been prescribed by his physicians to address his bi-polar disorder. He cannot tolerate medications to address his ADHD. (Parent; [REDACTED]) He has been healthy so far this school year, and other than using his Albuterol inhaler just before his movement class in the morning, per [REDACTED]'s recent prescription, he has not required medications at school. He no longer takes Clonidine, which causes him to fall asleep, for his bi-polar disorder, at lunchtime, as the afternoon dose was discontinued during the summer pursuant to discussion between the [REDACTED] nurse and Student's physician. ([REDACTED]) Student is able to participate in sports and aerobic activities with his medication and some restrictions. ([REDACTED])

A previous due process hearing was held between the parties in this case regarding the provision of a free appropriate public education to Student under the *IDEA* before a different

impartial hearing officer in May and June 2010, addressing violations alleged to have occurred during Student's 2008-09 and 2009-10 school years. The hearing officer in that case issued his Decision and Order on June 28, 2010, wherein he ordered certain independent assessments at District expense to be completed and for an IEP to be developed by mid-September 2010 for implementation during the 2010-2011 school year. In his order, the hearing officer gave the IEP team the option of implementation of Student's resulting IEP in the District's schools with support, or, alternatively, placement of Student in a private therapeutic day school (See *Motion for Stay Put Order, Exhibit B*)

Student was attending District elementary School P at the time of the previous hearing and decision. () However, following completion and consideration of the independent assessments, as ordered by the previous hearing officer, District developed a new IEP, dated September 28, 2010, and Student was subsequently transferred to School H for implementation of the IEP requirements, including a full time nurse and social worker and an increased amount of specialized instruction in a self-contained classroom with 10 or fewer students. () D22-69)

School H is a single level accessible elementary school, accommodating students grade pre-school through 8, with a student population of both typical and disabled peers. () The staff at School H designed a special education program in accordance with Student's 9/28/10 IEP, including the addition of a self-contained classroom and the hiring of a special education teacher to instruct him. () Thereafter, the Illinois State Board of Education determined that District had complied with the previous hearing officer's decision and order, and it confirmed its determination of compliance, in response to Parent's counsel's objection, in correspondence dated December 3, 2010. (; D 338) Student received the instruction and services called for in his 9/28/10 IEP, including special education instruction in all academic areas, and speech/language therapy, psychologist and social work services, occupational therapy, and nursing services. He was provided special transportation due to his asthma. He made progress on his IEP goals and benchmarks. () D22-69, 310-326)

The 1500 minutes of specialized instruction and related services called for in the 9/28/11 IEP pursuant to the hearing order and IEE recommendations equaled a full elementary instructional week. (D62) Student did not attend physical education or other "specials" with peers during the 2010-2011 school year until after March 29, 2011. () Student did not experience any behavioral problems at School H. () Staff was trained regarding Student's health needs and prepared for any medical emergencies that might occur. Although short of breath when running around the classroom two times, his health was good and well controlled with medication, and he experienced no serious allergy or asthma related problems. () He was happy there, he liked his teacher and he learned from her, he was socially well adjusted, and he had friends. () Student) Parent was happy with the education Student received at School H. She saw evidence of academic progress, particularly in regard to his spelling, handwriting, and his vocabulary. He had strengths in math and artistic ability and had leadership qualities. (Parent;)

Neither party appealed the hearing officer's decision. However, subsequent to ISBE's determination that District had complied with the 6/28/10 hearing decision and order, at the time that he submitted a request for District's payment of attorney's fees, Parent's counsel filed a lawsuit under 42 U.S.C. s. 1983 in the United States District Court on Parent's behalf, naming District and the Illinois State Board of Education and its Superintendent as defendants. In that lawsuit, Parent disputed District's compliance with the previous hearing officer's order. Parent raised and the court considered a number of issues, including District's alleged failures to provide an intensive reading remediation program, assistive technology and support, occupational therapy for organizational management, monthly progress reports, and school records in the 2010-11 school year pursuant to the hearing officer's order and the IEEs that were performed in conjunction therewith. The court granted Parent a preliminary injunction against District only, on March 8, 2011, wherein District was required to convene an IEP meeting and add the following items to Student's IEP in order to comply with the previous hearing officer's order:

- a) Provide an intensive reading remediation program using systemic, phonics-based, multi-sensory methodology, such as Wilson or Orton-Gillingham;
- b) Provide direct instruction in written language;
- c) Provide for use of a computer both at home and at school, with SOLO software program, Version 6 installed;
- d) Provide 60 minutes per week direct support in use of assistive technology devices and software;
- e) Provide direct occupational therapy services that address (Student's) sensory processing, safety, self-help and organizational management skills;
- f) Provide an assessment by a physical therapist to assess balance and safety in mobility;
- g) Provide monthly progress reports to the parent.

The court determined that the failure to provide Student's records to Parent was a clear violation of the June 28, 2010 order. However, an order for same was not included in the March 8 preliminary injunction, and the court noted in its final Memorandum Opinion and Order, dated October 25, 2011, that Parent had withdrawn that request. (P500-507; *Motion for Stay Put Order, Exhibits C and D; Memorandum Opinion and Order* in Civil Action No. 10 C 7819, dated 10/25/11, p. 2, referenced herein as *Hearing Officer Ex. B*)²

Following entry of the court's injunction, Student was assessed by a District physical therapist, who recommended accommodations for Student for physical education. (P57) He was informally assessed by [REDACTED] District's citywide teacher serving School H in regard to multisensory instruction for students with learning disabilities, on March 23, 2011. [REDACTED] P475-476)³ [REDACTED] consulted with [REDACTED], Student's special education teacher. [REDACTED] received training in *Orton-Gillingham* multi-sensory instruction, and she began use of that methodology with Student. They developed additional reading goals for Student, including a goal directed toward improvement of his encoding and decoding skills through the use of multi-sensory strategies, which was appropriate for Student's needs. [REDACTED]; P32-35, 475-476)

IEP meetings were convened on March 29 and May 11, 2011 for the purpose of adding the items referenced in the court's preliminary injunction to Student's IEP. (P1-91; D70-120, 124-189) The IEP team adhered to what the Parent and her attorney wanted, even though they felt the IEP was too restrictive for Student. [REDACTED] Student subsequently participated in physical education class, with the accommodations, and in library, and technology with his special education classmates. All of the instruction and services called for in Student's IEPs were provided by staff at School H. ([REDACTED]) All of Student's needs were being met at School H, he made progress, and he did not require a more restrictive environment. [REDACTED] He could have been taught to read, write, spell, and perform math at grade level at School H had he not been sent to [REDACTED]. There was enough time and a small enough setting to give him 1:1 instruction in [REDACTED] class. ([REDACTED])

Per the court's order, a monthly progress report was issued for the month of April, and IEP and regular report cards were issued as well. Parent visited Student's classroom frequently. She felt that his teacher took good care of him. ([REDACTED]; Parent; D308-328.) Student was provided with a laptop computer in addition to the computer loaded with specialized software for his use in [REDACTED] s classroom, and Student, Parent, and Student's sister were provided with training on the use of the laptop, although there were some technical problems that were addressed. ([REDACTED], Parent)

² The federal judge hearing the 1983 compliance matter issued her final order in that matter on October 25, 2011, and a copy of her order was provided to the hearing officer in this matter by counsel for Parent via email on October 25, 2011 and prior to the second day of hearing. Therein the court reviewed the history of the 1983 action and vacated the preliminary injunction of March 8, 2011 on the grounds that District had complied with the injunction by amending Student's IEP to incorporate the specific relief sought by Parent when it is issued a "comprehensive 54 page revised IEP" on May 11, 2011." The parties' cross motions for summary judgment on the request for injunctive relief were declared moot.

³ [REDACTED] testified credibly that she did not know what had happened to the protocol and answer sheet from her assessments, but that her results were accurately reported at P475-476.

Student received approximately 11 sessions of private tutoring from [REDACTED] beginning in April 2011 and ending in June, when [REDACTED] left for vacation. She was paid for the tutoring by District. Student was transported to tutoring by cab. [REDACTED]

Parent became aware of [REDACTED] through her attorney in November 2010. (Parent) The family and their attorney visited [REDACTED] in November 2010. ([REDACTED]) All Parent wanted was for Student's health issues to be monitored, and she believes that they could be monitored anywhere. However, because the IEP meetings held at School H during the 2010-2011 school year, involving the parties' lawyers, were acrimonious, Parent feels embarrassed and fears that School H staff do not want to work with her. She has been pleased with [REDACTED] monitoring of Student's health. There has been a significant improvement in Student's ability to do complex math problems since his doctor took him off of his afternoon dose of Clonidine while at [REDACTED]. (Parent)

The school nurse at School H monitored Student's health by coming to his classroom at School H on a daily basis. ([REDACTED]) She also trained staff regarding Student's health needs. ([REDACTED]) There were two incidents of note regarding Student's health issues while at School H. The first involved Student's misplacement of his medication bag briefly in the lunchroom, but Parent was notified and she provided replacements until the bag was located. (Parent; [REDACTED])

The second involved Student's afternoon Clonidine dosage in June 2011 at the beginning of summer school. During the regular school year, [REDACTED] gave Student a dose of Clonidine, which had a sedative effect, as prescribed by his physician after lunch at approximately 12:30 p.m. The school day ended at 1:45 p.m. When the prescription ran low, she sent the empty container home in an envelope in Student's bag with leeway for Parent to obtain a refill. Near the end of the regular school year, she sent the container home to allow Parent to refill the prescription, and she continued to administer the Clonidine to Student as prescribed until the end of the regular school year, at which time she retired. A different nurse was at School H for summer school. ([REDACTED]) Summer school ended at 11:00 or 11:30 a.m. ([REDACTED]) Student attended only a few days of summer school at School H, with T.M. continuing as his teacher. The summer school nurse came to the class room to monitor Student on a daily basis, but he was not administered Clonidine because it was too early to administer it during school hours. ([REDACTED]) Parent subsequently complained to the school that Student's behavior at home had deteriorated because he was not receiving the Clonidine before leaving school for the day. ([REDACTED]; Parent)

Parent and ISBE entered into an Agreed Order on June 14, 2011 whereby Parent would dismiss the 1983 suit against ISBE with prejudice and ISBE would direct District to place Student at [REDACTED] School. (*District's Response to Motion for Stay Put Order, Exhibit B*) ([REDACTED]) then directed District to make the [REDACTED] placement within 14 days in correspondence dated June 17, 2011. ([REDACTED]; P528) She did not review the Student's IEP nor did she visit School H or consult with any members of Student's IEP team before issuing her directive. ([REDACTED]) Her placement decision was not based on the Student's May 11, 2011 IEP, which had been developed pursuant to the preliminary injunction. Rather, she reversed ISBE's previous determination of compliance with the June 28, 2010 hearing officer order, and directed the Student's placement at Cove to remediate the District's lack of compliance. ([REDACTED]; P528)

District complied with ISBE's directive, and Student began attending [REDACTED] summer session on July 1, 2011 at District expense. ([REDACTED]) [REDACTED] staff has been using Student's May 11, 2011 IEP, including the provision of 2 sessions with a Wilson Reading instructor each week. ([REDACTED]) does not have a psychologist on its staff, and it is not providing afterschool tutoring to Student. ([REDACTED]) The [REDACTED] coordinator screened him and went over use of the laptop provided by District when he arrived at [REDACTED]. She has had to see him only handful of times, and he is able to use the computer and the software competently. ([REDACTED]) The laptop is loaded with the software recommended by the IEE assessor. ([REDACTED]) uses MACs rather than [REDACTED] and *Kurzweil* software, rather than *Solo*, which the assessor does not recommend. ([REDACTED]) ([REDACTED]) Director of Occupational Therapy would recommend a public school for Student if it had a small class size and collaboration between providers. ([REDACTED]) ([REDACTED]) believes in LRE and in transitioning students back into public programs when there is a right fit in that environment. ([REDACTED])

Due to the distance from his home to [REDACTED] School, Student must ride the school bus for approximately 3 hours each day. (Parent) He usually sleeps on the bus and arrives at school sleepy. He sometimes falls asleep at school. (Student; [REDACTED]; Parent)

Upon District's motion, based on its lack of knowledge of or participation in the Agreed Order between Parent and ISBE, the court vacated the Agreed Order of Parent and ISBE on July 14, 2011 (*District's Response to Motion for Stay Put Order, Exhibits B and E; and Hearing Officer Exhibit B*) Thereafter, District advised Parent's counsel that it would not fund the [REDACTED] placement for Student beyond the summer session ending July 29, 2011. (*Motion for Stay Put Order, Exhibits F and G*) As noted above, the Parent's due process hearing request in the present matter was then submitted, along with a request for stay put placement at [REDACTED], on August 4, 2011. (See *Due Process Hearing Request and Motion for Stay Put Order*, dated 8/4/11)

Conclusions of Law

At a due process hearing convened pursuant to the provisions of the Illinois School Code, it is incumbent upon the District to present evidence that, at all times relevant to the issues in the case, it properly evaluated and identified Student's needs and either provided or offered to provide him with a free appropriate public education in the least restrictive environment. 105 ILCS 5/14 8.02a (g-55)(2010) The burden of persuasion is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005) In this case, Parent bears the burden of persuasion on all issues.

An appropriate education, commonly referred to as FAPE, is an education that is reasonably calculated to provide the student with meaningful educational benefit, as based upon an individual education plan, or IEP, developed by an IEP team, including the student and his parent. *Hendrick Hudson Dist. Bd. Of Ed. v. Rowley*, 458 U.S. 176 (1982) And see *Jaccari J. v. Board of Education*, 690 F.Supp.2d 687(N.D. Ill. 2010) The school district is required to follow procedures that are designed to allow the parent to participate in the development of the IEP. The applicable procedures are set forth in 34 CFR 300.300-.328(2006) and 23 ILAC 226.110-.350(2007). Procedural violations alone cannot be deemed a denial of FAPE unless the evidence proves that the violations impeded the student's right to FAPE, the parent's right to participate in the decision making process, or caused the student to be deprived of an educational benefit. Otherwise, a hearing officer's determination of whether FAPE was received must be based on substantive grounds. 20 U.S.C. 1415(f)(3)(E)(2007); 34 CFR 300.513(a)(2006)

Each special education student is to be placed in the least restrictive environment in which he can receive a satisfactory education, which is to be determined by where his IEP providing him with FAPE can be implemented. 20 U.S.C. 1412(a)(5)(2005); 105 ILCS 5/14-8.02(d)(2008) And see *James and Lee Anne D. v. Board of Education*, 642 F.Supp.2d 804(N.D. Ill. 2009).

"Under the doctrine of res judicata, 'a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'" *Highway J Citizens Group v. U.S.D.O.T.*, 456 F.3d 734, 741 (7th Cir. 2006) Federal law requires the following in order for res judicata to apply: 1) an identity of the parties or their privies; 2) an identity of the causes of actions; and 3) a final judgment on the merits. *Id*

Parent seeks the following relief in the current matter: That District shall continue Student's placement at [REDACTED] provide transportation as a related service for after-school tutoring; change Student's IEP to address needs for adaptive physical education and organizational deficits; reimburse Parent for transportation costs incurred during May and June, 2011; provide such compensatory education services as may be recommended by staff at Cove School to make up for the loss of FAPE during the 2010-2011 school year; and convene an IEP meeting that will implement the foregoing relief. As discussed below, the Parent has not sustained her burden of proof in this cause. The testimony of District personnel was credible and compelling, the testimony of Parent, Student, and even [REDACTED] staff and independent evaluators was overall more supportive of District's position than Parent's. The preponderance of the evidence relevant to the issues in the case therefore favors the District. The IEP of May 11, 2011, resulting from the federal court's determination of necessary additions, is appropriate to address Student's needs, and, according to the evidence presented in this hearing, it was being

implemented by District before the ISBE directive and can still be implemented at School H. An appropriate transition must be made from ██████████ back into School H, and that can be done by allowing Student to remain at ██████████ for the remainder of the Fall term and to begin at School H at the beginning of the new term in January 2012. In spite of Parent's concerns that School H staff would not want to work with her because of the stressful litigation that has been ongoing, the demeanor and testimony of that staff suggested that they miss Student and would welcome him back to School H. There was no indication that they would not be willing and able to work with Parent. In regard to Parent's specific allegations of denial of FAPE, it is concluded as follows:

1. District did not deprive Student of a free appropriate public education in the least restrictive environment when it advised Parent's counsel that it would not continue to fund the Cove placement beyond the summer session.

Parent has asked that ██████████ be declared the least restrictive environment in which Student can receive a satisfactory education. It is clear from the timing of the submission of the hearing request in this case that it was filed for the purpose of maintaining District's funding of Student's private school placement. However, District did not violate the ISBE directive. Rather, it placed Student at ██████████ and paid for it as instructed. The June 17, 2011 directive from ██████████ was based upon ISBE's reconsideration of its previous compliance determination, not upon a consideration of LRE factors, and came immediately following the Agreed Order ISBE's attorneys entered into with Parent's attorney without the knowledge of the District. The court vacated that Agreed Order on July 14, 2011, citing her mistaken belief that District had been informed of the agreement between ISBE and Parent before the Order was entered. District's objection to the ██████████ placement cannot be considered arbitrary under these facts, and there is no law that prohibits it from objecting to payment for private placement under these circumstances. Student has been attending ██████████ at the District's expense since July 1, 2011. He has not been deprived of FAPE by the District's objection to the placement, especially since District correctly asserts, as the preponderance of evidence presented in this hearing shows, that Student could have received a satisfactory education in the public school placement called for by his May 11, 2011 IEP.

ISBE did not designate the length of time it deemed necessary for Student to be placed at ██████████ to remediate District's noncompliance with the previous hearing officer's order in its June 17, 2011 directive. Student will have received nearly 6 months of therapeutic day placement at District expense at the end of the current term. Based upon the facts, it cannot be said that 6 months is an insufficient period of time for that remediation.

2. The issue of implementation of a reading remediation program for Student was addressed and decided in the federal court's order upon its interpretation of the prior hearing officer's Decision and Order.

Throughout these proceedings, Parent's counsel has been advised that any issues that were already addressed in the previous litigation between these same parties would not be re-addressed in this case. Although Parent's counsel asserted at the time of the Pre-Hearing Conference that the issues he seeks addressed in this case are different from those addressed in the previous due process hearing because they concern only the 2010-11 school year, not the 2008-09 and 2009-10 school years, it is clear that the majority of the issues raised and ultimately decided in the 1983 action involved Student's educational programming for the 2010-11 school year, as the September 28, 2010 IEP, which was the subject of the compliance dispute, was designed to be implemented and was being implemented in the 2010-11 school year. Nevertheless, Parent was given a full hearing in the present case and was allowed to present all of the testimony and documentary evidence she wished to introduce, to assure that she was not precluded from presenting evidence on any issues that had not been fully addressed previously.

As District has correctly argued, the exact issue of provision of an intensive reading remediation program for this Student by this District during the 2010-2011 school year, has

already been addressed and decided. The preliminary injunction entered in the federal action required that it be included in Student's IEP, the District did so, and the IEP was implemented at School H and at [REDACTED]. On October 25, 2011, the federal court vacated the injunction, noting that District had complied by correcting Student's IEP, culminating in the current IEP of May 11, 2011, and she dismissed the parties cross motions for summary judgment on the grounds that no issues remained for determination.

The preponderance of the evidence supports District's position that the issue of an effective reading remediation program was already considered and resolved in previous litigation, and, further, that the IEP developed pursuant to the federal court order provides an appropriate reading program and that it was being implemented at School H by [REDACTED] before ISBE directed Student's change of placement to [REDACTED].

3. The District did not deprive Student of FAPE by failing to provide him with a complete curriculum during the 2010-2011 school year.

Parent's counsel has cited *34 CFR 300.110* for the proposition that District violated Student's right to FAPE during the 2010-11 school by failing to offer Student a complete curriculum. That regulation requires the State to ensure that its school districts "... take steps to ensure that its children with disabilities have available to them the variety of educational programs and services available to nondisabled children...including art, music, industrial arts, consumer and homemaking education, and vocational education." The public school staff in this case was given the task of complying with the previous hearing officer's June 28, 2010 Order, which required them to provide services in accordance with private evaluations, some of which had not even been performed at the time of that Order, and which they had to interpret, incorporate into an IEP, and then implement. They also had to incorporate the ordered compensatory services, which required significant service minutes, into Student's school day, taking into account his medical diagnoses and medications for same. They developed an IEP which they were led to believe was compliant with the hearing officer's order and the subsequent assessment recommendations, and the Illinois State Board of Education in fact confirmed the District's compliance with the hearing officer's Order in the Fall of 2010, leading staff to believe that they were in compliance. They designed a program individualized for Student, as contemplated by the IDEA. They hired a special education teacher, made sure that the classroom and class size was compliant with the order, and they provided Student with the instruction and services called for in the IEP that was developed for him. They did all of this in an accessible elementary school that included a population of age appropriate typical peers, Student's least restrictive environment.

While it is true that Student was not attending any "specials" with classmates until after the March 29, 2011 IEP, when Parent and/or her attorney requested them, there was insufficient evidence provided at this hearing of what "specials" should have been provided to Student during what part of the school year and in what amount. It is also noteworthy that Parent does not request any relief regarding this alleged violation except for the request that adaptive physical education be added to Student's IEP, as addressed in Issue No. 4 below. Student did begin to receive physical education, with the accommodations recommended by the court ordered physical therapy assessment included in his IEP, as well as library and technology instruction with his disabled classmates in the Spring of 2011. Prior to that he did participate in recreational activities during recess and have computers in his classroom. The school library was no doubt available and accessible to Student and his teacher and all of his other service providers. [REDACTED] and Parent also referenced Student's artwork. Therefore the preponderance of evidence does not support a finding of FAPE deprivation on this issue.

4. Student was not deprived of FAPE due to the failure of the District to offer adaptive physical education during the 2010-2011 school year.

Parent's counsel has cited 34 CFR 300.108 for the proposition that District deprived Student of FAPE during the 2010-11 school year by not offering Student adaptive physical education. That regulation requires the State "... to ensure that its school districts make physical education services, specially designed if necessary, available to every child with a disability receiving FAPE, unless...(it) does not provide physical education to children without disabilities in the same grades." At the time of the Pre-Hearing Conference, Parent's attorney requested and was granted a month continuance of the due process hearing date in this cause on the grounds that he was securing an adaptive physical education assessment. However, no evidence of such an assessment was presented for consideration at hearing. Nor did Parent call either a [REDACTED] or a District physical education teacher to testify. Counsel stated during his closing argument that he had been unable to find an assessor in the area of adaptive physical education. Additionally insufficient evidence was produced at hearing to determine if and at what point in the school year and in what amount physical education was offered to Student's nondisabled classmates. The evidence did show that Student was provided with physical education instruction with his disabled classmates in the Spring of 2011 and also that the physical therapist's assessment, including recommendations regarding physical education accommodations, were included in Student's IEP. He has also received 15 minutes of movement class each morning at Cove School. Therefore, there is insufficient evidence to support Parent's contention that Student was deprived of FAPE regarding the provision of adaptive physical education during the 2010-2011 school year.

5. The issue of District's failure to remediate organizational deficits caused by ADHD symptoms during the 2010-2011 school year has been addressed and decided in the federal court's order upon its interpretation of the prior hearing officer's Decision and Order.

The federal court injunction called for Student to receive direct occupational therapy services to address Student's organizational deficits per an independent occupational therapy assessment that was performed in compliance with the June 28, 2010 due process hearing Order. Furthermore, the District's occupational therapist testified that she provided services relating to Student's organization of his desk and his backpack pursuant to his IEP at School H before Student was placed at [REDACTED]. The evidence does not support Parent's position on this issue.

6. The issue of District's failure to provide Parent with monthly progress reports has been addressed and decided in the federal court's order upon its interpretation of the prior hearing officer's Decision and Order.

District was ordered to provide monthly progress reports to Parent in the federal court's preliminary injunction. The evidence presented in the present matter includes a report for April, the first full month of school following the addition of this requirement to Student's March 29, 2011 IEP. Additionally, the evidence included IEP report cards of Student's progress on his goals and benchmarks and an IEP developed in conjunction with the court's order on May 11, 2011. There is insufficient evidence to establish a denial of FAPE in relation to monthly progress reports in the current matter.

7. The issue of District's failure to provide assistive technology and services and training has been addressed and decided in the federal court's order upon its interpretation of the prior hearing officer's Decision and Order.

The federal court injunction required District to provide Student with use of computers for home and school with *SOLO* software program, Version 6 installed, and 60 minutes per week direct support in the use of assistive technology devices and software. Although there were technical problems that had to be resolved with Student's school provided laptop, which were ultimately resolved, District did provide a classroom computer for Student with the software he required installed on it and with a laptop with the proper software on it as well as training for

Student and his Parent and his sister. He received further training in the summer program at [REDACTED] at District's expense. He has not required additional direct A.T. services this Fall according to [REDACTED] A.T. coordinator, and the independent assessor confirmed at this hearing that the laptop Student has from the District has the SOLO software she recommended and the federal court ordered pursuant to her recommendation, although the computers used by [REDACTED] do not use the software she recommends.

8. District did not deprive Student of FAPE by a failure to monitor and report on administrations of medications during the 2010-2011 School year.

The preponderance of the evidence in this case supports District's contention that it carefully monitored Student's physical condition relating to his asthma and was attentive to the administration of his medication. [REDACTED] School H's certified school nurse, and one of the most persuasive witnesses to testify at this hearing, gave credible and compelling testimony in support of District's position. [REDACTED] monitored Student on a daily basis, kept detailed logs, and had good communication with Parent regarding the need to refill the necessary prescriptions provided by Parent. Parent admitted that she had good communication with [REDACTED] and [REDACTED] and that Student was well cared for at School H during the 2010-11 regular school year. She was unhappy with the failure of the summer nurse to administer Clonidine in the morning before he left school, but Student was not denied FAPE due to same, and the Clonidine was subsequently discontinued altogether at the request of the [REDACTED] nurse.

9. The issue of District's failure to provide all school records to the parent was addressed by the federal court upon its interpretation of the prior hearing officer's Decision and Order and also in consideration of Parent's pre-hearing motion regarding same in this matter.

In its Memorandum Opinion and Order on Parent's request for injunctive relief dated 2/25/11, the federal court addressed the prior hearing officer's Order that District "conduct a records search and disclose all documents relating to (Student)." The parties did not include production of records in the Preliminary Injunction presented to the court and signed on March 8, 2011, presumably because all records to that date had been produced. Additionally, District counsel provided all of the documents in District's possession requested by Parent's counsel in this case prior to hearing pursuant to a records request made at the outset of this case, with the exception of emails produced at hearing following [REDACTED] testimony, for which she made a search, and the emails Parent's counsel wanted to use were admitted into evidence by stipulation of the parties. Parent's counsel declined hearing officer's offer to let him call any additional witnesses or to recall any witnesses upon the production of those emails or any other records. As District counsel has stated, Parent's attorney has now had copies of Student's records provided to him at least 3 times in 3 different lawsuits. Witness [REDACTED] was questioned by Parent's counsel during hearing about the existence and location of her Woodcock-Johnson testing protocols, which Parent's counsel argues were not produced to him in the present case. She did record her testing results in writing, and Parent's attorney relied on those recorded results during the hearing. Parent's counsel also submitted over 500 pages of documents for potential use at hearing in this matter, and District counsel made a good faith effort to assure that Student's records were produced to Parent's counsel. The preponderance of the evidence does not support Parent's contention that Student was deprived of FAPE or that his client's case was in any way prejudiced by a failure to provide copies of any of Student's school records as requested in this case.

10. Parent did not introduce evidence at hearing of District's alleged denial of FAPE due to failure to provide transportation to and from after school tutoring in May and June of 2011 as a related service in accordance with Student's IEP of May 11, 2011.

In his closing argument Parent's counsel argued that Parent was entitled to reimbursement for cab fare for Student to travel to and from his private tutoring with [REDACTED], citing

Knable v. Bexley, 238 F.3d 755, 770 (6th Cir. 2001). He based this request on [REDACTED]'s testimony that Student came to tutoring in a cab. However, no testimony or documentary evidence was introduced at the hearing that Parent paid for cab fare in any amount, that District did or did not pay for the cab, or that the expenses were submitted to District for reimbursement and rejected. Therefore Parent did not meet her burden of proof on this issue.

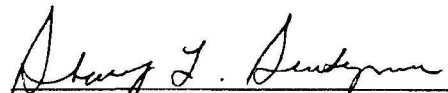
Also, regarding transportation, Parent's counsel, in his written summation, requests an Order that District provide transportation as a related service for after-school tutoring, stating that "placement at [REDACTED] should include transportation for any after-school tutoring as a related service under 34 CFR 300.34(c)(16)." Tutoring at [REDACTED] was not an issue in this case, Student has not been provided with any after-school tutoring by [REDACTED] and [REDACTED] is not being ordered as Student's placement in the LRE in this Decision and Order. As ordered below, the May 11, 2011 IEP shall be implemented at School H, and the District will be obligated to adhere to the provisions of that IEP.

Finally, Parent's attorney, in his written summation in this matter, cites *Kevin T. v. Elmhurst*, 36 IDELR 153, 102 LRP 9030 (N.D. IL 2002) and *Knable v. Bexley*, 238 F.3d 755 (6th Cir. 2001) for the proposition that the evidence in this matter requires a finding that Student was deprived of FAPE because "District did not complete an IEP that could be expected to produce reasonable progress, and also that the student's IEP was not properly implemented (sic) at (School H)." This argument is rejected, as is his request for any additional compensatory services from the District. As discussed above, the extent to which the September 28, 2010 IEP was deemed noncompliant with the former hearing officer's decision was considered in the 1983 action and remediated by the May 11, 2011 IEP. The placement at [REDACTED] at ISBE's direction was also provided, per E.H.'s testimony and her June 17, 2011 directive, to remediate the alleged noncompliance that occurred in the 2010-11 school year as the result of 1983 action. The preponderance of evidence, insofar as it was relevant to any new claims of District's violation of FAPE for the 2010-2011 school year as raised in this matter, does not support Parent's argument that Student was denied a free appropriate public education by District during the 2010-11 school year. It is noted that review of the IEPs themselves and the very compelling and credible testimony of the Student's teacher and service providers from the District evidence that staff worked hard to develop and implement Student's IEPs appropriate to his needs, and that the IEPs were reasonably calculated to provide Student with meaningful educational benefit. Much of the testimony elicited from non-District personnel, to the extent it was relevant to the stated issues, and from Parent and Student themselves was supportive of District's position rather than Parent's.

IT IS THEREFORE ORDERED:

1. That Student shall remain at [REDACTED] at District expense until he is returned to School H pursuant to Order No. 2 below.
2. That District shall implement Student's IEP of May 11, 2011 at School H at the beginning of the District's Spring term in January 2012.
3. That District shall provide proof of compliance with the above Orders to the Illinois State Board of Education, Program Compliance Division, 100 N. First Street, Springfield, IL 62777-0001 on or before January 13, 2012.

DATED: November 18, 2011


Stacey L. Stutzman
Impartial Hearing Officer

APPENDIX TO DECISION AND ORDER
(Case No. 2012-0035)

Parent Documents used at hearing:

P 1 - 54 IEP Revision of 5/11/11
P 55 - 91 IEP of 3/29/11
P 142-153 Report of Neuropsychological Evaluation performed by [REDACTED] on 7/9 and 7/14/10
P 154-155 Curriculum Vitae of [REDACTED]
P 156-164 Report of Speech-Language and Assistive Technology Evaluation performed by [REDACTED] on 7/19/10
P 165-169 Curriculum Vitae of [REDACTED]
P 224-225 Score Report of Testing performed by [REDACTED] on 5/16/11
P 226 Curriculum Vitae of [REDACTED]
P 227-228 Testing Results for 4/25-5/11/11 by N.F.
P 229-230 Curriculum Vitae of [REDACTED]
P 288 Related Service Documentation (Social Worker)
P 295-296 Related Service Documentation (School Nurse)
P 299 Related Service Documentation (School Nurse)
P 319-324 Related Service Documentation (Occupational Therapy)
P 390-393 Documentation of Parent Contacts
P 395-397 Documentation of Parent Contacts
P 400 Email dated 12/3/10
P 404 Email dated 11/1/10
P 410 Student work product
P 431-432 type written teacher notes, undated
P 433 Report of A.T. Screening dated 7/11/11
P 434-435 Medical Information and Authorization forms
P 436-437 Asthma Action Plan dated 3/11/11
P 438 EpiPen instructions
P 440-442 Occupational Therapy IEP Summary Report dated 3/24/11
P 443 Physician's prescription/medication change note dated 6/17/11
P 445-446 Emails dated 3/22 and 3/24/11
P 447-448 Monthly Progress Report dated 5/6/11
P 449-465 IEP Report Cards
P 475-476 Assessment results dated 3/23/11 and annual goal and benchmarks
P 500-504 *D.L. v. Bd. of Ed.*, 2011 U.S. Dist. LEXIS 19039 (N.D. Ill. 2011)
P 528 Correspondence from [REDACTED] of ISBE to District dated 6/17/11
P 531-532 Emails dated 5/13 and 6/7/11

District Documents used at hearing:

D 22 - 69 IEP dated 9/28/10
D 70 -120 IEP dated 3/29/11
D 121 Individual Health Care Plan dated 3/17/11
D 122 Food Allergy Plan dated 3/11/11
D 136-189 IEP dated 5/11/11
D 199-201 Report of Speech/Language Assessment dated 1/20/10
D 222-223 Service Documentation Records
D 231 Service Documentation Records
D 235-236 Service Documentation Records

Appendix Page 2

District Documents (con'd)

D 245	Service Documentation Records
D 250-271	Related Service Documentation-Speech/Language Therapy
D 290-297	Related Service Documentation-Social Worker
D 308-309	Monthly Progress Report dated 5/6/11
D 310-326	IEP Report Cards
D 328	Report Card
D 329-335	Student Profile (SCANTRON)
D 336	Correspondence from [REDACTED] of ISBE to District dated 6/17/11
D 338	Correspondence from ISBE to Parent's attorney dated 12/3/10
D 469-518	Report of Occupational Therapy Evaluation performed 7/19-8/12/2010, undated

RIGHT TO REQUEST CLARIFICATION

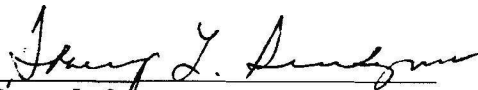
Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned hearing officer within five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought, and a copy of the request shall be mailed to the other party and to the Illinois State Board of Education. The right to request such a clarification does not permit a party to request reconsideration of the decision itself, and the hearing officer is not authorized to entertain a request for reconsideration.

RIGHT TO FILE A CIVIL ACTION

This decision shall be binding upon the parties unless a civil action is commenced. Any party to this hearing aggrieved by this final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to ILCS 5/14-8.02a(i), that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of the decision of the impartial due process hearing officer is mailed to the parties.

CERTIFICATE OF SERVICE

The undersigned due process hearing officer certifies that she served copies of the aforesaid Decision and Order upon Parent and Parent's counsel, District and its counsel, and the Illinois State Board of Education at their respective addresses by depositing same with the United States Postal Service at Libertyville, IL, certified mail postage prepaid, on November 18, 2011 before 5:00 p.m.


Stacey L. Stutzman
Impartial Hearing Officer